(3)

Supreme Court, U.S.
FILED
MAR 11 2003
OFFICE OF THE CLERK

No. 02-1092

In The

Supreme Court of the United States

ACCRUED FINANCIAL SERVICES, INC.,

Petitioner,

v.

PRIME RETAIL, INC., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITIONER'S REPLY BRIEF

RODNEY R. PATULA
Counsel of Record
DIANE L. GIBSON
AMY E. ROSE

SQUIRE, SANDERS & DEMPSEY L.L.P.
One Maritime Plaza
San Francisco, California 94111
(415) 954-0200

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

19 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

PETITIONER'S REPLY BRIEF 1

A. The Question of Federal Public Policy Was Raised and Considered Below. 2

B. This Case Does Present a Substantial Conflict Between Circuits – and About an Important Issue of Federal Law. 3

C. Review on the Second Question Presented – Concerning Federalism and Certification of State-Law Issues – Would Not "Revisit" Issues Previously Decided by this Court. 5

D. The Errors Below May Warrant Summary Action by This Court. 6

CONCLUSION 8

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Aldrich v. Aldrich, 375 U.S. 249 (1963) 7

Angeles Real Estate Co. v. Kerxton, 737 F.2d 416 (4th Cir. Md. 1984) 7

Berks v. United States, 825 F.2d 1262 (8th Cir. 1987) 5

Boyter v. C.I.R. Service, 668 F.2d 1382 (4th Cir. 1981) 6

Braun v. Lorillard Inc., 84 F.3d 230 (7th Cir. 1996) 4

DeWeerth v. Baldinger, 836 F.2d 103 (2d Cir. 1987) 6

Dresner v. City of Tallahassee, 375 U.S. 136 (1963) 6, 7

Dugger v. Johnson, 485 U.S. 945 (1988) 5

Farmer v. Ramsey, 159 F.Supp.2d 873 (D. Md. 2001) 4

Fiore v. White, 528 U.S. 23 (1999) 6

Goodlett v. Kalishek, 223 F.3d 32 (2d Cir. 2000) 6

Rodriguez v. Pacificare of Texas, Inc., 980 F.2d 1014 (5th Cir. 1993) 4

Shevin v. Exxon Corp., 526 F.2d 266 (5th Cir. 1976) 6

Tagatz v. Marquette University, 861 F.2d 1040 (7th Cir. 1988) 4

United National Insurance Co. v. R & D Latex Corp., 141 F.3d 916 (9th Cir. 1998) 5

United States v. Cervantes-Pacheco, 826 F.2d 310 (5th Cir. 1987) 1, 4

TABLE OF AUTHORITIES – Continued

Page

Universal Athletic Sales Co. v. American Gym Recreational & Athletic Equipment Corp., 546 F.2d 530 (3d Cir. 1976) 4

Virginia v. American Booksellers Ass'n, Inc., 484 U.S. 383 (1988) 6

Webb v. Hyman, 861 F.Supp. 1094 (D.D.C. 1994) 4

Zinniel v. Commissioner, 883 F.2d 1350 (7th Cir. 1989) 5

STATE CASES

Estate of Cohen, 66 Cal.App.2d 450, 152 P.2d 485 (1944) 7

Temeron, Inc. v. Ferraro Energy Corp., 861 P.2d 319 (Okl. Ct. App. 1993) 7

FEDERAL RULES AND STATUTES

28 U.S.C. § 1257 6

Fed. R. Evid. 402 1

Fed. R. Evid. 601 1

S. Ct. Rule 10(a) 3, 5

S. Ct. Rule 16.1 7

PETITIONER'S REPLY BRIEF

Respondents contend that "[t]he decision below is a narrow, fact-dependent ruling based exclusively upon state law." Opp. at 1. Certainly, the rulings below – made on motions to dismiss and directed to federal and state law claims – should not have been "fact-dependent" at all and should not have been based on state law alone. But more important here, the *questions* presented for review by this Petition are not narrow, factual, or concerned with state law. The lower courts barred the legal owner of claims for relief from suing on those claims in *federal* court. Federal law should have governed Petitioner's standing to sue on its federal claims. As to the state law claims, it is true that standing was dependent substantively on state law and public policy; however the *means* by which the courts below determined that state law and policy raise substantial federal questions, including questions of judicial federalism and of federal judicial discretion and restraint.

Also, the lower courts not only barred a party from suing, they barred its employees from testifying in federal court – purely a federal concern:

> The per se exclusion of whole categories of evidence is disfavored by the Federal Rules of Evidence. It is a fundamental tenet of those rules that, with few exceptions, 'all relevant evidence is admissible,' Fed. R. Evid. 402, and 'every person is competent to be a witness,' Fed. R. Evid. 601.

United States v. Cervantes-Pacheco, 826 F.2d 310, 315 (5th Cir. 1987) (rejecting a "per se rule that disqualifies the compensated informer from testifying as a witness"). This case asks whether federal courts have discretionary power

to recognize and to apply "policy-based" exceptions to this general rule and, if so, the limits of that power.

A. The Question of Federal Public Policy Was Raised and Considered Below.

The Opposition (at 3) contends that "Petitioner argued to the Fourth Circuit only the applicability of Maryland and California (not federal) law. . . . " In fact, however, AFS contended in its Opening Brief in the court of appeals that:

> [T]he [District] Court applied the doctrine of champerty and proclaimed that the public policies of California, Maryland and the *United States* prohibit contracts such as those [into] which AFS and its audit clients have entered. With all due respect, the District Court was wrong on *all counts*.
>
> . . . .
>
> The District Court . . . held that [the audit] agreements violate California, Maryland and *federal* public policy. That conclusion is erroneous. . . .
>
> The District Court's [holding] is tantamount to a judicial declaration of public policy for Maryland and the *United States* [in addition to California]. This is in derogation of the separation of powers clause [as the] formulation of public policy is the function of the Legislature, not that of the courts.

Supp. App., *infra* at 2sa, 3sa, 4sa (emphasis added and citations omitted). The district court held that if the choice-of-law provisions in the audit contracts were not enforceable, then "I would hold that witness contingency fee agreements affirmatively violate the fundamental

policy of the United States." App. at 40a, n.3. The district court identified no basis, other than its own judgment, for that conclusion. For its part, the court of appeals held that a Maryland court *would* disregard the choice-of-law provisions in the audit contracts – even though neither side challenged the district court's contrary conclusion – and then the panel majority ignored federal policy altogether. Petitioner can hardly be faulted for the panel majority's wild trajectory on choice-of-law issues and the applicability of federal law and policy. S. Ct. Rule 10(a).

Neither side was able to cite below – and neither has cited here – any authority for a federal policy against the assignment or prosecution of federal claims on any of the grounds articulated by the lower courts in this case. But that circumstance only confirms that those courts chartered on their own the public policies they invoked. *See especially* Question 1 in Petition at i. The issue of federal law and policy was properly raised below.[1]

B. This Case Does Present a Substantial Conflict Between Circuits – and About an Important Issue of Federal Law.

The Opposition pretends that the rulings below are not "evidentiary," and that therefore they cannot conflict with rulings in other circuits which recognize that expert

[1] In their Answer to the Petition for Rehearing below, Respondents asserted that Petitioner cannot "claim that the Court contravened rules [for determining or enforcing public policy] specifically applicable to a federal court." Supp. App., *infra* at 7sa. To the extent that is true, it is so because the rules are far from certain, especially in the absence of legislative pronouncements.

witnesses paid on a contingent basis are nonetheless competent to testify in federal court. The rulings below *are* evidentiary – but they are not merely evidentiary.

The lower courts barred AFS from the courthouse and thereby necessarily barred AFS from presenting *any* evidence, including the testimony of its own employees. The sole rationale for the district court's opinion and the "additional" basis for the court of appeals' decision was that if AFS were allowed to sue then its employees could testify, and its employees could not testify when they would be doing so to secure a contingency fee for their employer. On this point, the decisions below are directly in conflict with decisions by other federal circuit – not just district – courts. *See Braun v. Lorillard Inc.*, 84 F.3d 230, 237-38 (7th Cir. 1996); *Rodriguez v. Pacificare of Texas, Inc.*, 980 F.2d 1014, 1019 (5th Cir. 1993); *Webb v. Hyman*, 861 F. Supp. 1094, 1115 (D.D.C. 1994); *see also Tagatz v. Marquette University*, 861 F.2d 1040, 1042 (7th Cir. 1988); *United States v. Cervantes-Pacheco, supra*, 826 F.2d at 1315-16; *Universal Athletic Sales Co. v. American Gym Recreational & Athletic Equipment Corp.*, 546 F.2d 530, 539 (3d Cir. 1976).[2]

Moreover, the issue here implicates the federal courts' discretionary power to frame an exception to a "fundamental tenet" of the Federal Rules of Evidence. And at the very least, the exercise of such discretion, camouflaged as the enforcement of a "fundamental public policy," raises the

[2] At least one judge of the District of Maryland other than the judge who decided this case has followed the district court's decision in this case and has applied it to strike evidence. *See Farmer v. Ramsey*, 159 F. Supp. 2d 873, 883 (D. Md. 2001) (Legg, J.).

question of whether the courts below "departed from the accepted and usual course of judicial proceedings [so] as to call for an exercise of this Court's supervisory powers." S. Ct. Rule 10(a).

C. Review on the Second Question Presented – Concerning Federalism and Certification of State-Law Issues – Would Not "Revisit" Issues Previously Decided by this Court.

Contrary to the Opposition (at 3-4), the lower courts did not merely consult a state statute or other pronouncement of state law and from them confirm applicable state public policies; rather, each using the "predictive approach" reached conflicting conclusions as to *which* state's law and public policy is applicable in this case and "distilled from obscure and uncertain sources" the public policies of the states in question. *See* Pet. at 27. Thereafter, the court of appeals refused – even in the face of a compelling dissent on the state-law issues – to certify those issues to the Maryland Court of Appeals. That the court failed to explain its refusal does not diminish the worthiness for review of the second question presented. Plainly, the court of appeals exercised unfettered discretion in refusing the certification request. *See* and *compare Dugger v. Johnson*, 485 U.S. 945, 946 (1988); *United Nat'l Ins. Co. v. R & D Latex Corp.*, 141 F.3d 916, 919 (9th Cir. 1998) ("meaningful appellate review for abuse of discretion is foreclosed when the [lower] court fails to articulate its reasoning"); *see also Zinniel v. Comm'r*, 883 F.2d 1350 (7th Cir. 1989); *Berks v. United States*, 825 F.2d 1262 (8th Cir. 1987). And that is the very point of the second question presented. *See* Question 2 in Petition at i. If, as Petitioner contends, a lower court's discretion in this context should

be qualified *solely* by concerns of federalism, then there is a need for this Court to so rule. None of the prior decisions of this Court has done so.[3]

As is true of the decisions on this point cited in the Petition (at 23-27), the additional cases cited in the Opposition – *Fiore v. White*, 528 U.S. 23 (1999) and *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383 (1988) – involved constitutional issues the determination of which could or would be affected by the resolution of an uncertain question of state law. Similarly, in *Dresner v. City of Tallahassee*, 375 U.S. 136 (1963), this Court's jurisdiction under 28 U.S.C. § 1257 to review state court convictions depended upon uncertain state law rules regarding the scope of review by the state's courts. But none of these cases involved the exercise of discretion to certify on purely *Erie*-federalism grounds.

D. The Errors Below May Warrant Summary Action by This Court.

The Opposition is feeble indeed in its defense of the decisions below. First, the panel majority did not merely apply Maryland's barratry statute. On its face, the statute

---

[3] The Opposition does not respond at all to the evident inconsistencies among the circuits in deciding whether to use certification procedures. *See* Pet. at 25-26 and authority there discussed; *see also* and *compare Goodlett v. Kalishek*, 223 F.3d 32, 37 n.4 (2d Cir. 2000); *DeWeerth v. Baldinger*, 836 F.2d 103, 108 n.5 (2d Cir. 1987); *Boyter v. C.I.R. Service*, 668 F.2d 1382, 1385-86 (4th Cir. 1981); *Shevin v. Exxon Corp.*, 526 F.2d 266, 274-75 (5th Cir. 1976). As Respondents acknowledged below, "[t]here are no separate rules, well established or otherwise, 'governing how a federal court is to determine the public policy of a State.'" Supp. App., *infra* at 7sa.

does *not* apply here. *See* App. at 28a-32a and 66a-70a; *see also* and *compare Temeron, Inc. v. Ferraro Energy Corp.*, 861 P.2d 319, 325-26 (Okl. Ct. App. 1993). Second, the cancellation fee in the audit contracts is a term to which the audit clients agreed. The tenant's assignment of its claims against its landlord, like the cancellation terms and all other rights of the auditor created by the audit contracts, were in consideration for audit and collection services – all on terms bargained for by sophisticated parties, not "unilaterally determined" by the auditor. The only public policy implicated here is the freedom of contract. And finally, contrary to the Opposition (at 6), an assignment for a promise to perform future services is as enforceable as any other contract supported by such consideration. *See, e.g., Estate of Cohen,* 66 Cal. App. 2d 450, 458-59, 152 P.2d 485 (1944); *Angeles Real Estate Co. v. Kerxton*, 737 F.2d 416, 419 (4th Cir. Md. 1984) (applying Maryland law).

Though not sufficient alone to warrant this Court's review on *certiorari*, the decisions below are substantively wrong with respect to Petitioner's standing to sue on the federal claims asserted below. This Court may decide summarily that the court of appeals erred and vacate the judgment accordingly. S. Ct. Rule 16.1.

As to the judgment dismissing the state-law claims, this Court should vacate the judgment and certify the state law and public policy issues to the Maryland Court of Appeals. *See, e.g., Aldrich v. Aldrich*, 375 U.S. 249 (1963); *Dresner v. City of Tallahassee*, 375 U.S. 136 (1963). At a minimum, this Court should vacate the judgment and remand to the court of appeals with instructions that it explain its refusal to certify the questions presented here. S. Ct. Rule 16.1.

CONCLUSION

Respondents emphasize "that the *substantive* issues presented in this case are 'relatively obscur[e]'." Opp. at 1 (emphasis added). That, however, misses the point. The *questions presented for review* are not obscure in the least. They go to the essence of judicial power in the federal courts. How a federal court – in the absence of Congressional pronouncement – determines federal public policy, *how* it enforces it, and the extent of its discretion in doing so are indeed important questions. Similarly, whether a federal court's discretion in deciding to certify questions of state law and policy is subject to limits based solely on principles of federalism is a question of importance equal to that of other questions of federalism this Court has addressed in recent terms. Lastly, the decisions in this case, the bases stated for them, and the evident processes by which they were reached, cry out for the exercise of this Court's supervisory power. There is compelling need for this Court to answer those questions and to exercise that power. The Petition should be granted.

Respectfully submitted,

RODNEY R. PATULA
Counsel of Record
DIANE L. GIBSON
AMY E. ROSE

SQUIRE, SANDERS & DEMPSEY L.L.P.
One Maritime Plaza
San Francisco, California 94111
(415) 954-0200

Counsel for Petitioner

RECORD NO. 00-1971
And
RECORD NO. 00-1231

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ACCRUED FINANCIAL SERVICES, INC.,

Plaintiff-Appellant,

v.

PRIME RETAIL, INC., et al.,

Defendants-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

BRIEF OF APPELLANT IN CONSOLIDATED APPEAL

Rodney R. Patula, Esq.
Diane L. Gibson, Esq.
Squire, Sanders & Dempsey L.L.P.
One Maritime Plaza, Suite 300
San Francisco, California 94111
(415) 954-0200

Counsel for Appellant

* * *

Also assignments in which assignor and assignee share the proceeds of the chose-in-action are valid. See also *Klamath-Lake Pharmaceutical Ass'n v. Klamath Medical Serv. Bureau,* 701 F.2d 1276, 1282 (9th Cir. Or. 1983), *cert denied* 464 U.S. 822 (1983) (holding that "[a]n assignment of claims does not prevent the assignors from receiving the benefits of the litigation."); *Estate of Cohen,*

66 Cal. App. 2d 450, 458-459, 152 P.2d 485 (1944) (upholding an assignment by an heir to an heir-hunter agency of 30% interest in the estate of the heir's relative); see also *Angeles Real Estate Co. v. Kerxton,* 737 F.2d 416, 419 (4th Cir. Md. 1984).

In this case, however, because the assignment agreements between AFS and its audit clients contemplate services about which AFS employees *could* testify and because AFS' compensation for its services is contingent, the District Court struck down the assignments. The court ruled:

> . . . [T]he assignments made by the tenants to AFS are void as a matter of public policy because they are champertous. . . . Financial arrangements that provide incentives for the falsification or exaggeration of testimony threaten the very integrity of the judicial process which depends upon the truthfulness of the witness.

JA 0582, 0584. In so ruling, the Court applied the doctrine of champerty and proclaimed that the public policies of California, Maryland and the United States prohibit contracts such as those in which AFS and its audit clients have entered. With all due respect, the District Court was wrong on all counts.

A. California Has Never Adopted the Doctrine of Champerty

The District Court held that AFS' assignments were champertous and thus against the public policy of California. Champerty is a sub-species of the now long extinct offense of "maintenance," which was the "officious

intermeddling in a suit which in no way belongs to the intermeddler, by maintaining or assisting either

* * *

The agreements in this case and in *Termeron* are indistinguishable. Even if some basis existed for applying principles of champerty here, Prime has never claimed and cannot in good faith claim that AFS intended to stir up unnecessary or frivolous litigation, lacked any interest in the claims which it identified under a contract for services, intended to investigate whether the claims existed, or otherwise acted in bad faith. And even if Prime could make such a showing, modern tort law and the law of sanctions provides more than adequate remedies for Prime – *after* it successfully defends its conduct against AFS' allegations. Invalidating AFS' assignments and effectively precluding litigation on the merits of the claims against Prime was and is unwarranted.

In short, the District Court erred in applying the doctrine of champerty at all, but even if it could be properly applied here, the District Court misapplied it.

II. AFS' ASSIGNMENTS ARE NOT CONTINGENCY FEE AGREEMENTS FOR EXPERT TESTIMONY AND DO NOT VIOLATE ANY POLICY

The District Court construed the assignments in this case as contingent fee agreements for expert testimony and held that such agreements violate California, Maryland and federal public policy. That conclusion is erroneous for at least four reasons:

First, the agreements between the tenants and AFS do not call for or even contemplate testimony of AFS' employees as experts in exchange for a contingency fee. JA 0654-0755. Second, even if it were improper for AFS' employees to offer expert testimony when AFS had an interest in the outcome, such impropriety should not have voided AFS' assignments when AFS explicitly agreed that its employees would not testify as expert witnesses if the District Court ruled that such testimony would be improper. JA 0464-0465. Third, the District Court found that in light of the ratifications AFS obtained from each of its

* * *

Also, like AFS, a *qui* tam plaintiff is usually a witness to the fraudulent activity he or she is attempting to expose and may be called as a percipient or even an expert witness. Indeed, a court has no jurisdiction over a *qui tam* action if it is based upon public disclosure of the allegations. In other words, one cannot maintain a *qui tam* suit unless he or she qualifies as the "original source" of the information; he or she must have "witness[ed] some aspect of the fraudulent activity himself or otherwise discover, through his own labor, the information underlying his allegations." *Wercinski v. International Business Machines Corp.*, 982 F. Supp. 449, 461 (S.D.Tex. 1997); *United States, ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F. 3d 1156, 1161 (10th Cir. Kan. 1999). This "original source" requirement necessarily entails testimony by the *qui tam* plaintiff.

AFS is a proper plaintiff under the substantive and procedural law which applies here. Its ability to prosecute the claims it asserts is not vitiated by the fact that its

employees may testify for it in a case in which it has a financial interest.

D. The District Court Erred In Taking Up The Legislature's Function Of Formulating Public Policy

In footnote 3 of its opinion, the District Court stated:

> I have structured my analysis in the test as a choice-of-law issue. I have done so because California law so clearly prohibits witness contingency fee agreements. Perhaps I should add that if Maryland or federal common law were found to apply to the issue, I would hold that witness contingency fee agreements affirmatively violate the fundamental policy of Maryland and the United States.

JA 0584. The District Court's statement is tantamount to a judicial declaration of public policy for Maryland and the United States. This is in derogation of the separation of powers clause. The formulation of public policy is the function of the Legislature, not that of the courts. *See, e.g., Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 691-692 (1981) (function of articulating public

* * *

NO. 00-1971
and
NO. 01-1231

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ACCRUED FINANCIAL SERVICES, INC.,

Plaintiff-Appellant,

v.

PRIME RETAIL, INC., *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

APPELLEES' ANSWER IN OPPOSITION TO APPELLANT'S PETITION FOR REHEARING AND FOR REHEARING *EN BANC*

Charles P. Scheeler
Glen K. Allen
PIPER RUDNICK LLP
6225 Smith Avenue
Baltimore, Maryland 21209-3600
(410) 580-3000

Counsel for Appellees

* * *

App. Lexis 33801 (4th Cir. Sep. 13, 1991). This alleged "conflict," even if it existed, would not justify *en banc* review.

In any event, there is no conflict. AFS asserts that the conflict arises because the opinion supposedly supplanted

the three-step choice-of-law analysis Maryland courts have employed under § 187 with a one-step analysis. The court, however, did not alter or reject Maryland case law interpreting and applying § 187. To the contrary, the Court expressly invoked § 187. The Court simply found it unnecessary under the circumstances of this case to address explicitly the first and third steps of the analysis. It did not supplant the three-step analysis with a different analysis, it simply condensed the analysis. *See* pages 6-8 *infra.*

The second "conflict" AFS purports to identify is the opinion's supposed "contraven[tion]" of "well-established rules governing how a federal court is to determine the public policy of a state." AFS Petition at 1. AFS here again attempts to impart a federal character to the opinion it does not possess. There are no separate rules, well-established or otherwise, "governing how a federal court is to determine the public policy of a State." On an issue of state law (as here), a federal court is bound under *Erie* to determine a state's public policy just as a state court would. And that is precisely what the Court did: it relied on Maryland cases and Maryland statutes to determine Maryland public policy. AFS may not like the conclusion the Court reached, but it cannot accurately claim that the Court contravened rules specifically applicable to a federal court.

In addition to the purported "conflicts" discussed above, AFS also asserts that the choice-of-law and public policy issues constitute questions of "exceptional importance." Yet, there are no widespread ramifications to the federal system created by the Court's opinion that require

* * *